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No. 872

In the Supreme Court of the United States

OCTOBER TERM, 1960

THE NAVAJO TRIBE, A TREATY TRIBE OF INDIANS, ET AL., PETITIONERS

v.

NATIONAL LABOR RELATIONS BOARD, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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OPINIONS BELOW

The order of the district court is not officially reported (R. 108–111).[1] The opinion of the court of appeals (Pet. A1–A7) has not yet been reported. The Board's Decision and Direction of Election (R. 37–46) are reported at 126 NLRB 603.

JURISDICTION

The judgment of the district court was entered on May 10, 1960 (R. 107). The judgment of the court of appeals was entered on March 2, 1961 (Pet. A8).

[1] "R." refers to the Joint Appendix in the court of appeals.

The petition for a writ of certiorari was filed on April 4, 1961. The jurisdiction of this Court rests upon 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the National Labor Relations Board has jurisdiction to conduct a representation election among the employees of a company shipping material in interstate commerce, notwithstanding that the company's plant is located on an Indian reservation.

STATUTE INVOLVED

The pertinent provisions of the National Labor Relations Act, as amended, are set forth in the petition (Pet. A9–A12) and in the appendix, *infra*, pp. 12–13.

STATEMENT

A. *The Board's Decision and Direction of Election.*—The Texas-Zinc Minerals Corporation, hereafter called the Company, operates a uranium concentrate mill at Mexican Hat, Utah, which is located within the Navajo Reservation (R. 108; 5, 8, 38). Annual shipments substantially in excess of $5,000,000 in value are made from the Company's plant to the Atomic Energy Commission's receiving station in Colorado (R. 108; 14, 38, 68–69). The operation is carried on under the terms of a 25-year lease with the Navajo Tribe, executed in 1956 (R. 108; 13, 32–35). The Company employs about 87 persons, of whom 47 are members of the Tribe and 40 are non-Indians (R. 108; 14, 100, 108).

On May 12, 1959, the United Steelworkers of America, AFL–CIO, filed a petition with the Board

under Section 9(c) of the Act requesting that an election be held to determine whether the Company's employees wished to be represented by it for purposes of collective bargaining (R. 108; 5, 38). A hearing was thereafter conducted in which the Navajo Tribe intervened specially for the purpose of contesting the jurisdiction of the Board to apply the Act to operations on the Navajo Reservation (R. 108–109; 6, 39). The Steelworkers and the Company also participated in the hearings, and two other unions, International Union of Operating Engineers, AFL–CIO, and International Hod Carriers, Building and Common Laborers Union of America, intervened for the purpose of having their names included on the ballot in the election (R. 109; 5–6, 39).

The Tribe contended in the hearing before the Board that it enjoys powers of self-government under its Treaty of 1868 with the United States, including the power to regulate labor-management relations within its reservation, and that this authority was not affected by the passage of the National Labor Relations Act (R. 6, 37). Pursuant to its asserted authority to legislate within tribal lands in the field of labor-management relations, the Tribal Council of the Navajos had adopted resolutions in August, 1958, which prohibited solicitation for union membership and "any other incidents or adjuncts of unionization activities on the Navajo Reservation" (R. 12, 22–28). The resolutions had further provided that violations by Indians may be punished by sentence to hard labor, and that non-Indians who engage in union activity may be excluded from the reservation (*ibid.*). The

power of exclusion of non-Indians from the reservation was asserted to derive specifically from the Treaty of June 1, 1868, between the Navajo Tribe and the United States, 15 Stat. 668, which in applicable part provides (R. 7):

> * * * the United States agrees that no persons except those herein so authorized to do, and except such officers, soldiers, agents, and employees of the government, or of the Indians, as may be authorized to enter upon Indian reservations in discharge of duties imposed by law, or the orders of the President, shall ever be permitted to pass over, settle upon, or reside in, the territory described in this article.

The Tribe contended before the Board that it was authorized by the Treaty of 1868 and its own resolutions of August, 1958, to exclude "any and all representatives of the United Steelworkers of America," and in effect to prevent the Board's representation proceeding from being conducted (R. 6–7).

Following the hearing, the Board, on February 11, 1960, issued its Decision and Direction of Election (R. 109; 37). The Board (two members dissenting) held that the Act vested it with jurisdiction over "commercial enterprises operating on an Indian reservation," and that there were no valid policy considerations which militated against the exercise of that jurisdiction here (R. 109; 43). Accordingly, the Board directed an election among the company's employees to determine whether they desired one of the competing unions, or none, as their bargaining representative (R. 44–46).

B. *The Decisions of the District Court and Court of Appeals.*—On March 23, 1960, the Tribe brought this suit in the district court, contesting the validity of the Board's decision, and seeking a preliminary injunction against the holding of the election. The Company moved to intervene as plaintiff and also applied for an injunction against the holding of the election (R. 29). The complaint asserted that the Board lacked jurisdiction in the representation proceeding because the National Labor Relations Act was not intended to apply to interstate activities of business enterprises located on Navajo tribal lands (R. 15–16). The complaint further alleged that full authority respecting labor-management relations on the reservation was vested by law in the Tribal Council, governing body for the Navajo Tribe, and that the Board's administration of the Act on tribal lands was contrary to the policies adopted by the Tribal Council (R. 9, 18). The Board and the unions moved to dismiss the complaint for failure to state a claim warranting relief, or, in the alternative, for summary judgment in their favor (R. 30–31, 75, 103).

On May 10, 1960, following hearing, the district court denied the motions for preliminary injunction and dismissed the complaint (R. 107, 111). The court concluded that the operations of the Company's plant located on the Navajo Reservation affected commerce within the meaning of the National Labor Relations Act; that the Board was accordingly authorized to entertain the petition of the United Steelworkers for a representation election; and that the Tribe's complaint

therefore failed to state a claim warranting relief (R. 108–111).

The court of appeals affirmed the conclusions of the district court and held that the Board had jurisdiction to direct the representation election (Pet. A1–A7). The court held that the National Labor Relations Act clearly applied to the Company's interstate operations, and that a different conclusion was not required by the circumstance that its plant was located on the Navajo Reservation, for Congress, in passing the Act, superseded "the local policies of the States and the Indian tribes, in all cases to which the * * * Act applies" (Pet. A6).[2]

ARGUMENT

1. Petitioners recognize (Pet. 9) that Congress has the power to encompass interstate business located on Indian reservations within the scope of the National Labor Relations Act, even though this may entail the modification or abrogation of earlier treaties. See *The Cherokee Tobacco*, 11 Wall. 616, 621; *Cherokee Nation* v. *Southern Kansas Ry. Co.*, 135 U.S. 641, 656–657. The basic question therefore is whether Congress intended this result. Petitioners contend (Pet. 9–10) that, since the Act does not specifically refer to Indian reservations, it cannot be assumed that Congress intended to cover labor disputes involving interstate businesses on such premises. This contention is erroneous, for there is strong evidence

[2] The Tribe thereafter applied for a stay of the election, pending the filing of this petition for certiorari, which was denied by the court of appeals. On April 6, 1961, Chief Justice Warren denied a further request for a stay.

demonstrating that the Act was designed to cover those disputes no less than other disputes affecting commerce.

In enacting the National Labor Relations Act, Congress intended "to regulate labor relations to the full extent of its constitutional power under the Commerce Clause * * *." *Amalgamated Association* v. *Wisconsin Employment Relations Board,* 340 U.S. 383, 391; see *National Labor Relations Board* v. *Fainblatt,* 306 U.S. 601, 607. Moreover, "Congress did not merely lay down a substantive rule of law to be enforced by any tribunal competent to apply law generally," but "went on to confide primary interpretation and application of its rules to a specific and specially constituted tribunal [the National Labor Relations Board] * * *." For it "considered that centralized administration of specially designed procedures was necessary to obtain uniform application of its substantive rules and to avoid [those] diversities and conflicts likely to result from a variety of local procedures and attitudes toward labor controversies." *Garner* v. *Teamsters Union,* 346 U.S. 485, 490.

The foregoing is manifest from the Act itself. Section 1 declares it "to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce * * * by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing" (Appendix, *infra,* p. 13). Sections 9(c)(1) and

10(a) confer upon the National Labor Relations Board jurisdiction over all representation questions and unfair labor practices "affecting commerce"[3] (Pet. A11, A12). Section 10(a) adds that the Board's power "shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise * * *." And, finally, the definitions of "employer" and "employee" in Section 2 are broad, and provide no exception for Indians or businesses on Indian lands (Pet. A9–A11).

This comprehensive regulatory scheme makes it apparent that Congress could not have intended to exempt a business like the Company's—which annually ships in interstate commerce materials valued in excess of $5,000,000 (see *supra*, p. 2)—from the regulatory provisions of the Act merely because it happened to be located on an Indian reservation. Labor troubles at such an operation could, by obstructing the free flow of goods across state lines, imperil industries vital to the national economy no less than if the operations were located on non-Indian territory. Moreover, to leave an Indian tribe free to apply its own labor laws to a business simply because it was located on Indian territory would nullify a uniform national labor policy no less than when a state or

[3] Section 2(7) defines the term "affecting commerce" as "in commerce, or burdening or obstructing commerce or the free flow of commerce, or having led or tending to lead to a labor dispute burdening or obstructing commerce or the free flow of commerce" (Pet. A11).

other local authority purports to do so. See *Garner* v. *Teamsters Union, supra; Hill* v. *Florida,* 325 U.S. 538; *Automobile Workers* v. *O'Brien,* 339 U.S. 454.

Accordingly, the lower courts properly construed the Act as applying to interstate operations on an Indian reservation, even though it does not specifically mention such reservations.

2. The ruling of the courts below that Congress intended to include Indian lands within the National Labor Relations Act is strongly supported by the decision of this Court in *Federal Power Commission* v. *Tuscarora Indian Nation,* 362 U.S. 99. That case held that the provisions of the Federal Power Act, authorizing the taking of property for hydroelectric development upon payment of just compensation, were applicable to Indian lands, notwithstanding that the statute did not specifically refer to such lands. The Court, in rejecting the Tuscarora Nation's reliance on *Elk* v. *Wilkins,* 112 U.S. 94 (see Pet. 9), stated that "it is now well settled * * * that a general statute in terms applying to all persons includes Indians and their property interests" (362 U.S. at 116). The Court then went on to conclude that the Tuscarora property was included, relying upon the "complete and comprehensive" character of the provisions of the Federal Power Act, the fact that the statute "gives every indication that * * * Congress intended to include lands owned or occupied by any person or persons," and finally upon the absence of any provision to "exclude lands or property owned by Indians" (*id.* at 118). As we have shown, the same

considerations are equally applicable here.[4] See also *Superintendent of Five Civilized Tribes* v. *Commissioner*, 295 U.S. 418, 419–420; *Oklahoma Tax Commission* v. *United States*, 319 U.S. 598, 607; *Ex parte Green*, 123 F. 2d 862 (C.A. 2).[5]

3. Petitioner's suggestion (Pet. 11), that application of the Act to the Company's employees might "disrupt the tribal life of an untutored and dependent people," is addressed to the wrong forum.[6] Questions as to the wisdom and desirability of the Act's coverage are for Congress. *Lone Wolf* v. *Hitchcock*, 187 U.S. 553, 568. In any event, when the Board was initially confronted with the question of whether to enforce the provisions of the Act, with respect to a commercial enterprise located on an Indian reservation in *Simplot Fertilizer Company*, 100 NLRB 771, 107

[4] Nor can the *Tuscarora* case be distinguished, as petitioners attempt to do (Pet. 10), by relying on the reference to "Indian reservations" in Section 3(2) of the Federal Power Act, which defines the term "reservations" for purposes of that statute. The Court found that this provision was not relevant to the question presented because it interpreted Section 3(2) as embracing only " 'lands and interests in lands owned by the United States' " (362 U.S. at 111).

[5] *Williams* v. *Lee*, 358 U.S. 217 (see Pet. 11), is distinguishable. The Court there held that the state court lacked jurisdiction over a civil suit involving Navajo Indians, since their treaty vested the tribal court on the reservation with jurisdiction over such matters. However, unlike here and in *Tuscarora*, the basis for the civil action was not a broad and comprehensive federal law which could be deemed to have superseded the tribal treaty (*id.* at 222).

[6] See, however, the affidavit contained in the record (R. 76–78) which describes the extent to which the Navajo Indians, both on and off the reservation, have already taken roles in modern industry and have participated in the collective bargaining process.

NLRB 1211, the Board requested the advice of the Secretary of the Interior, in his supervisory capacity respecting the Indian tribes (R. 48–51). The Secretary replied (R. 55):

> * * * we do not believe that merely because Indians, as well as non-Indians, are employed in the enterprise involved, there should be distinction made between this case and any other case handled by the National Labor Relations Board. It is our view that Indians should be able to enter into industry on a non-discriminatory basis and that having entered into industry they should share its burdens and its benefits in the same measure as do non-Indians.

As the Board concluded in its decision in the representation case, there is "no Federal policy * * * with which an exercise of jurisdiction herein would be at variance" (R. 43).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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MAY, 1961.

APPENDIX

Section 1 of the National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C. 151) is as follows:

SECTION 1. The denial by some employers of the right of employees to organize and the refusal by some employers to accept the procedure of collective bargaining lead to strikes and other forms of industrial strife or unrest, which have the intent or the necessary effect of burdening or obstructing commerce by (a) impairing the efficiency, safety, or operation of the instrumentalities of commerce; (b) occurring in the current of commerce; (c) materially affecting, restraining, or controlling the flow of raw materials or manufactured or processed goods from or into the channels of commerce, or the prices of such materials or goods in commerce; or (d) causing diminution of employment and wages in such volume as substantially to impair or disrupt the market for goods flowing from or into the channels of commerce.

The inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract, and employers who are organized in the corporate or other forms of ownership association substantially burdens and affects the flow of commerce, and tends to aggravate recurrent business depressions, by depressing wage rates and the purchasing power of wage earners in industry and by preventing the stabilization of competitive wage rates and working conditions within and between industries.

Experience has proved that protection by law of the right of employees to organize and bar-

gain collectively safeguards commerce from injury, impairment, or interruption, and promotes the flow of commerce by removing certain recognized sources of industrial strife and unrest, by encouraging practices fundamental to the friendly adjustment of industrial disputes arising out of differences as to wages, hours, or other working conditions, and by restoring equality of bargaining power between employers and employees.

Experience has further demonstrated that certain practices by some labor organizations, their officers, and members have the intent or the necessary effect of burdening or obstructing commerce by preventing the free flow of goods in such commerce through strikes and other forms of industrial unrest or through concerted activities which impair the interest of the public in the free flow of such commerce. The elimination of such practices is a necessary condition to the assurance of the rights herein guaranteed.

It is hereby declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.

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On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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PETITIONERS' REPLY MEMORANDUM

In considering the apparent conflict between the provisions of the Navajo Tribe's treaty with the United States and those of the National Labor Relations Act, as amended—and petitioners have stated frankly that this is not a question of Congressional power but rather one of construction (Pet. 9)—two important datum points, ignored alike by the Labor Board and by the Steelworkers, must be borne in mind.

First. The National Labor Relations Act, insofar as here material, was last amended in 1947. See 29 U.S.C. § 151, set forth at Labor Board Br. Op. 12-13.

Nearly three years later, on April 19, 1950, Congress passed a comprehensive act "In order to further the purposes of existing treaties with the Navajo Indians * * *." Sec. 1 of the Navajo and Hopi Rehabilitation Act, c. 92, 64 Stat. 44, 25 U.S.C. § 631. This Act was amended as late as August 23, 1958 by Public Law 85-740, 72 Stat. 834, to grant still further assistance to the tribes concerned.

We do not for a moment contend that this recognition of the existing obligations of the treaty with the Navajo Tribe amounted to a legislative limitation of the National Labor Relations Act. We do urge that the apparent conflict between the specific terms of a treaty recognized as being in force as late as 1958 and the general terms of general legislation last amended in its relevant impact here in 1947 does call for an application of rules of construction formulated by this Court over many years (Pet. 9-11), rules that were all too plainly disregarded by the court below.

Second. Since the Navajo Tribe relies upon its own Treaty, neither decisions by the Labor Board nor expressions by the Secretary of the Interior in respect of the Fort Hall or any other Indians (*J. R. Simplot Co.* 100 N.L.R.B. 771, 107 N.L.R.B. 1211; see Steelworkers Br. Op. 9-10, Labor Board Br. Op. 10-11) are relevant—unless similar treaty provisions are involved, which is not even remotely the case.

We do not think that the circumstance that this case is limited to the terms of the Navajo Treaty lessens its public importance for purposes of review. Cf

Williams v. *Lee*, 358 U.S. 217 (Navajo Treaty involved).

For the Navajo Tribe numbers around 85,000 persons, and its reservation extends over parts of three States, comprising an area approximately as large as West Virginia. The Navajo Tribe is now the largest Indian tribe in the country, and its reservation is similarly the largest Indian reservation now in the United States.

We submit, therefore, that resolution of the question presented by the petition may fairly be said to call for an authoritative decision by this Court.

Respectfully submitted.

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